No. 2583.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DAN D. SUTHERLAND,

Plaintiff in Error,

vs.

FRANK W. PURDY,

Defendant in Error.

Writ of Error to the District Court of the Territory of Alaska, Third Division.

HON. FRED M. BROWN, *Judge.*

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

Counsel for defendant in error find it necessary to prepare this brief without yet having received the brief for the plaintiff in error. We do so, reserving the right to file a supplemental brief in answer to the brief of the plaintiff in error whenever filed. In this brief we must anticipate the argument of counsel for plaintiff in error from

the position taken upon the trial and the specifications in the Bill of Exceptions. We deem it well first to make the following

STATEMENT OF FACTS.

The defendant Purdy resides at Forty Mile, Y. T., where he is employed by the Northern Commercial Company. On May 31st, 1913, his friend, George L. Gates, an old-time Alaska prospector, had received news of the Shushana strike in the White River region of Alaska, and was about to join the rush. Purdy provided him with funds, and executed a power of attorney authorizing Gates to locate mining claims in Alaska. This power of attorney was acknowledged and delivered Gates on the last day of May, when Gates and McKinney together left Forty Mile for Dawson en route to the White River country. At Dawson the certificate of the U. S. Consul as to the authority of the notary public at Forty Mile was attached to the power of attorney. (Record, pp. 138-9 and 160-163.) Gates and McKinney at Dawson joined Nels Nelson, one of the original Shushana discoverers, who had gone out for supplies, and together they proceeded to the Shushana diggings, arriving there on the evening of June 26th, 1913. (Record, p. 126.)

On July 6th, 1913, Gates made a discovery of placer gold upon the ground in controversy, and located the same as placer claim No. 2 Below Discovery, on Big Eldorado Creek, naming the defendant Purdy as locator. (Record, pp. 128-136.) The discovery is admitted, and all other acts of location are conceded regular, except that the power of attorney from Purdy to Gates was not recorded when the discovery was made and notice posted.

The Shushana diggings and the White River region of Alaska are north and east of the main Alaska Range, and for years were included in the Forty Mile Recording Precinct, with a recording office at Steel Creek, a short distance from the Yukon. Prospectors in the White River region continued to record their notices at Steel Creek as late as the summer of 1913, though as a matter of fact when the Fourth Judicial Division of Alaska was created in 1909 its boundaries were so fixed as to include Steel Creek and the recording office, but left the White River region in the Third Judicial Division. On May 13th, 1913, the White River Recording Precinct was created by order of court entered at Cordova on that day, and H. E. Morgan was appointed Recorder. Morgan was operating in the White River, but had left on a trip to

Dawson before news of his appointment reached him. When he heard in Dawson of his appointment he also had news of the Shushana strike, and decided to establish the recording office in the new diggings, but did not arrive there until about July 20th. The Purdy location notice and power of attorney to Gates were filed in his office for record, and fees paid, July 27th-29th. (Record pp. 215-7.) Morgan, however, had not yet received the blank books intended for the official records, so he used an ordinary journal in which he entered a brief summary or abstract of the documents filed with him for record. At the top of page 278 he wrote the heading "Powers of Attorney," and then numbered consecutively each power of attorney received. That from Purdy to Gate was No. 9, and the following record appears on page 280 of that book, which is designated as Volume 1 of the official records of the White River Recording District. (Record, pp. 267-274.)

"July 29, 1913.

9 Frank W. Purdy to G. L. Gates. Sworn to before R. McDonald, of Forty Mile, Y. T.

JAS. McLEOD.

May 31st, 1913.
Recorded at 55 M. past 6 A. M., July 29, 1913.
By request W. E. McKinney.
H. E. MORGAN,
H. H. WALLER,
Dep."

The plaintiff Sutherland did not arrive in the Shushana until August 17th. He was not upon the ground in controversy until August 30th, when he made an attempted location of the same, with full knowledge of Purdy's location, but assuming the same to be invalid because the power of attorney was not recorded before discovery and posting of notice by Gates. (Record, pp. 87-90 and 105-7.)

Let us here refer to the decisions of Judge Brown, which we print in this brief. Appendix A is a copy of his decision *in re Likaits vs. Johnson*, and recites more fully the facts we have briefly reviewed as to the White River Recording District. It also states the views of the trial court as to the validity of a placer mining location under the so-called Wickersham Act of August 1, 1912, where the discovery and posting of notice occurs prior to the record of the power of attorney. Judge Brown there held the same valid when the record

was complete and all essential acts of location had been performed before the rights of others intervened. Appendix B is a copy of his decision in this case overruling plaintiff's objections to testimony as to the power of attorney from Purdy to Gates. It recites the facts as to the record of the power of attorney, states how the same was recorded, refers to the testimony showing the subsequent loss of the power of attorney, and permitted oral evidence of its contents to be introduced. That evidence satisfied the jury and resulted in a verdict for defendant. Counsel for the defendant in error now respectfully invite the attention of the court to these two decisions rendered by Judge Brown. The statements there made as to the facts will supplement this statement and give the Appellate Court a very accurate idea of the entire situation.

CONTENTIONS WHICH WE ASSUME WILL BE MADE BY PLAINTIFF IN ERROR.

We assume the plaintiff in error will contend that the trial court erred in the following particulars:

1. In holding that under the Act of Congress of August 1st, 1912 (Compiled Laws of

Alaska, Section 129b), it was not essential that the power of attorney from Purdy to Gates be recorded prior to the discovery and posting of notice, if such power of attorney was actually recorded, and all the acts of location fully completed before any rights of Sutherland intervened.

2. In holding that such power of attorney was actually recorded within the requirements of the law when filed for record with the proper recording officer, regardless of whether that officer afterwards made a complete copy of the same in his records or merely the abstract shown in this record.

We believe these are the two principal points involved in the consideration of this case. Other contentions may be made by plaintiff in error upon minor points, such as the sufficiency of the showing of diligence made by defendant in his efforts to produce the power of attorney at the trial. We shall but call attention to the fact that the defendant was denied the continuance he requested in order to produce a copy of the power of attorney, and also that the jury answered two special findings submitted by the court and found the facts to be as alleged by defendant. We shall address our argument in this brief to the two law

questions which we assume will form the principal contentions of the plaintiff in error.

ARGUMENT UPON THE FIRST QUESTION.

The trial court held, and so instructed the jury, that if the power of attorney from Purdy to Gates was recorded, and all the essential acts of location otherwise fully completed, before the rights of Sutherland intervened, then the location of the defendant in error was valid, even though his power of attorney to Gates was not of record at the time of the discovery and marking of the boundaries. The views of the trial court on this point are fully expressed in the decision *in re Likaits vs. Johnson,* printed as Appendix A of this brief. That decision was rendered by Judge Brown after the question had been fully argued by the same counsel who appeared on the trial of this case. We have printed that decision in this brief, and make the same a part of the argument here for the defendant in error. It is therefore unnecessary to repeat the citation of authorities given in that decision. In substance, the defendant in error contends that under the Wickersham Act of August 1st, 1912, a location by power of attorney is valid if the power of attorney is recorded even after

discovery and staking, but before intervening rights of third parties. The Act provides (Compiled Laws of Alaska, 1913, p. 145):

> "Sec. 129b. That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made."

The most rigid construction of which this language is possible is that the power of attorney must be recorded in order to constitute a valid location. In other words, the law makes the record of the power of attorney essential to a valid location in the same manner that a discovery is essential to a valid location.

It is usually and perhaps correctly stated that a discovery must precede a valid location, but this does not mean that discovery must precede staking, marking the boundaries and recording; if all these acts be done first, then the location is made valid by a subsequent discovery, providing the discovery is made prior to intervening rights.

In the same way it may be held under the Wickersham Act that the power of attorney must

be recorded in advance of a valid location. This means that the location is not valid until the power of attorney is recorded. If it is recorded, however, and all other acts are completed before intervening rights, then the location is valid. *The location becomes valid when all essential acts are performed.* There must be a discovery. The boundaries must be marked. The power of attorney must be recorded. But the order in which these acts are performed is immaterial if all the acts necessary to a valid location are performed before intervening rights.

Location does not mean discovery. Location does not mean marking the boundaries. Location does not mean posting or recording notice of location. It means all these acts together. All acts required by law are necessary before there is a valid location of a mining claim.

But the order of the several acts is immaterial if all are performed before intervening rights.

> "The order in which these acts of location took place is not essential, if no rights intervened."
>
> *Debney vs. Iles,* 3 Alaska 450.
>
> "Generally speaking, under the laws of Congress as well as under state laws and local

rules, the natural and proper order of procedure to complete a location are (1) discovery, (2) posting notices, (3) recording notice, (4) marking boundaries, (5) development work; but the *order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights.* The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will innure to the benefit of the locator." (Italics are ours.)

Lindley on Mines (3rd Ed.), Sec. 330.

Cited and approved by Justice Brewer in *Creede and C. C. M. & M. Co. vs. Uinta T. M. & T. Co.,* 196 U. S. 337, 49 Law Ed. 501.

We quote the following from the opinion by Justice Brewer in the latter case, 25 Sup. Ct. Rep. 272:

"These suggestions add strength to the concurring opinion of three leading commentators on mining law (referring to Lindley, Snyder and Morrison), the general trend of the rulings of the department and decisions of the courts, to the effect that the order in which the several acts are done is not essential, except so far as one is dependent on another. Doubtless a locator does not acquire the right of exclusive possession unless he has made a valid location, and discovery is essential to its

validity; but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right?''

See also:

Brewster vs. Shoemaker, 28 Colo. 176; 53 L. R. A. 793; 80 Am. St. Rep. 188; 63 Pac. 309,

from which we quote:

''The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one.''

There are so many cases and authorities which might be cited in support of this statement that it would unduly extend the argument to attempt even a reference to all of them.

The locator is usually given a specific time after discovery in which to perform the additional acts required by state laws or local customs. For

instance, ninety days are allowed in most cases after discovery and posting of notice in which to mark the boundaries and record the notice. There is no such provision in either the Federal Law of 1872 or the Wickersham Act, the only law in force at the time of this location. Of course, a discovery is essential to a valid location. So, perhaps, is a recorded power of attorney when the location is made under such authority. Doubtless both are essential to a valid location, but it is even more reasonable to argue that the discovery must be made before the power of attorney is recorded, than to argue that the power of attorney must be recorded before the discovery is made. There is nothing in the law stating which must be done first. Is it not enough that both occur before intervening rights?

On this line of thought we shall quote again from the opinion of Justice Brewer in *Creede vs. Uinta, supra*:

> "Suppose a discovery is not made before the marking on the ground and posting of notice, but is then made, and it and all other statutory provisions are complied with before the entry, which is an application for the purchase of the ground—*of what benefit would it be to the government to require the discoverer*

to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which, under the law, ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or, to go a step farther, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the steps necessary for a location in the statutory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit, and awarding the property to the plaintiff therein, on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location?''

Now when the power of attorney from Purdy to Gates was recorded on July 29th, 1913, all other acts required by law had been performed. There was a valid discovery of mineral; the notice was posted on the ground; the boundaries were marked by proper monuments. Manifestly, after Gates recorded the power of attorney on July 29th, he could have again gone on the ground and posted the same notice and set the same monuments. Why

need he do so? In the language of Justice Brewer, just quoted, "of what benefit would it be * * * to repeat the marking on the ground, the posting of notice and the other acts requisite to perfect a location?"

We submit the conclusion is irresistible under the facts shown. Plaintiff Sutherland saw the notice posted by Gates for the defendant Purdy, and also the stakes and monuments marking the boundaries of the claim. (Record, pp. 89-90 and 105-7.) Gates could have gone on the ground again between July 29th and August 30th and posted another notice and set other monuments. The Supreme Court says he need not do so after discovery, even if such notice and monuments were set long before the discovery. Surely the discovery is equally as essential to a valid location as the record of the power of attorney. What line of reasoning can require him, under the Wickersham Act, to post a new notice and set new stakes after recording the power of attorney, if he is not obliged to do so after making an actual discovery?

The General Land Office has issued instructions under this Act (circular of October 29, 1912). They have occasion to advise claimants as to what is necessary to be done under this Act to constitute a

valid location as the basis of an application for patent. It is interesting to note that the department evidently does not believe that the power of attorney must be recorded in advance of the other acts. All the acts must be performed, but it makes no difference in what order the separate acts are performed. That is clearly the meaning of the instructions issued by the General Land Office. If the commissioner ever meant to hold that the power of attorney must be recorded prior to the other acts of location he would have stated so in his instruction.

It is also interesting to observe the language of the act passed by the Territorial Legislature of Alaska, approved April 30th, 1913 (Session Laws, page 283), and which went into effect after the Purdy location had been made. The Legislature re-enacted the Wickersham Act to a great extent, but evidently that body desired the power of attorney to be recorded in advance of the other acts. It is evident also that the Legislature did not construe the Wickersham Act to mean this, for while it adopted the language of the Wickersham Act, it was careful to provide that the power of attornew must be "recorded in the office of the recorder in whose precinct such location is made, previous

to the date of the initiation of such location." Then the Legislature of 1915 (Session Laws, page 14) again amended the law so as to provide for the record of the power of attorney "prior to the date of the filing for record of any location thereunder."

In other words, the Alaska Legislature meant to require the record of powers of attorney in advance of all other acts of location, and it said so. If Congress had meant to do the same, it also would have said so in the law it passed. Congress did not say so, and the courts will not legislate such a requirement into the act. Congress meant to abolish and did abolish the right to locate mining claims by agent without written authority. That right has always existed under the federal mining laws and still exists in the states (*Lindley on Mining* (3rd Ed.), Sec. 331.) Congress abolished that right in Alaska and made it necessary for the agent to have authority in writing to locate mining claims in Alaska. The written instrument must be acknowledged, and it must also be recorded in order to perfect a valid location by an agent. We submit that is all the Wickersham Act requires.

The lower court in passing upon this question called attention to the well known rule that forfeitures are odious to the law and not favored. In

his decision *in re Lakaits vs. Johnson* (Appendix A), Judge Brown says:

> "But the act does not in express terms require that the power of attorney be recorded before the first step is taken in making the location, nor unless the same is so done the location shall be null and void, and as said in *Sturtevant vs. Vogel* (167 Fed. 452), 'the intention that failure to comply with the statute should work a forfeiture of mining rights ought not to be imputed to the Legislature except upon the very clearest language, not susceptible to any other reasonable construction.' "

Now we shall contend that the Wickersham Act does not in express terms render a location null and void for failure to record the power of attorney. The only forfeiture provision in that act reads as follows:

> "Sec. 129e. That any placer mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made."

Observe that the only thing declared null and void is a "pliacer mining claim attempted to be located *in violation of this act.*" Now it would be a violation of that act to attempt to locate more than forty acres in an association placer, or to

locate more than two claims during any calendar month, but surely it cannot be said that to post a notice or mark the boundaries of a location before the power of attorney be recorded is a violation of the act.

The Legislature of Alaska recognized this distinction in the act of April 30th, 1913. (Session Laws of 1913, p. 289.) Sections 12¼-12¾ incl. limit the size of an association placer and the number of claims which may be located by any person. Sections 14-17 incl. of that act require the locator to do certain things, such as posting notice, marking boundaries and record. Now it is to be noted that Section 18 treats any attempted location in excess of the amount allowed as a *violation* of the act, but a failure to properly post or record notice is *merely a non-compliance.* Note the language of that section:

> "If the discoverer of any placer deposit fail to comply with any of the provisions of Sections 14, 15, 16 and 17, within the time therefor specified, all right to appropriate any portion of the public domain, acquired by him by reason of his discovery, shall cease; and any placer mining claim attempted to be located in violation of sections 12¼, 12½ and 12¾, or any of them, shall be null and void, and the area thereof may be located by any

qualified locator as if no such previous attempt had ever been made."

The Legislature drew a clear distinction between a violation of the law and a non-compliance with it. It is clear and explicit in its terms, and allows the locator nothing in either event. The Legislature was very careful about this, while the Wickersham Act merely provides a forfeiture for locations attempted in violation of its terms—not of locations made merely without full compliance with its terms.

The only acts necessary to locate a placer claim in Alaska at the date of the Purdy location was a discovery and marking of the boundaries. Posting of notice and record was not then required. *Sturtevant vs. Vogel, Supra.* Did Gates violate the Wickersham Act when he made the discovery before his power of attorney was of record? Manifestly not, nor did he violate the act by marking the boundaries. Perhaps his marking was non-effective until he recorded the power of attorney, but he violated no law by doing so. His power of attorney was recorded, however, more than a month before plaintiff Sutherland went upon the ground. Was it necessary for Gates to again mark those boundaries—the only other act necessary to

perfect the location? He could have done so any time between July 29th and August 30th, but it would have been "a useless and idle ceremony which the law does not require," as stated in *Brewster vs. Shoemaker, supra.*

Counsel for plaintiff contended before the trial court that the recording of the power of attorney was not one of the required acts of location, but a step essential to qualify the locator. But even if that contention were true, would Gates be required, after recording his power of attorney, to go again upon the ground and perform the "useless and idle ceremony" of pulling up and re-setting the same stakes or again marking the boundaries with the markings already there? He had already marked the boundaries, and the Wickersham Act does not attempt to declare such marking void.

ARGUMENT UPON THE SECOND QUESTION.

The plaintiff in error will doubtless contend, as he did before the trial court, that the power of attorney from the defendant Purdy to Gates was not recorded as required by law, and that the location of the ground in controversy by Gates for Purdy is void for that reason.

The defendant in error contends that the power of attorney was duly recorded within the meaning of the law when it was delivered to the official recorder of the White River Recording District on July 29th, 1913, and by him filed for record.

The Alaska laws contain no express provision for the manner of recording powers of attorney. The only reference we find is in Section 379, Compiled Laws of 1913 (Sec. 15, Carter's Code), which merely provides for record of deeds, contracts, mortgages, powers of attorney, etc., in separate books, a requirement generally disregarded in Alaska. Section 522, Id., relates solely to the record of conveyances, and concludes with the words "every conveyance shall be considered as recorded at the time it was so received."

There being no express provision of law in Alaska governing the manner of recording powers of attorney, we must be governed by the general rules of the law as to records and when same are to be considered as effective. Cyc. thus states the general rule:

> "An instrument is ordinarily deemed to be recorded when its holder leaves it with the proper officer for the purpose of being recorded, even though it is not then actually re-

corded, or is recorded in the wrong book; and the person so depositing it in good faith is not required to see that the officer properly performs his duty, or to be prejudiced by a failure of the latter to do so."

Vol. 34 Cyc., pp. 588-9.

Cady vs. Purser, 131 Cal. 552, 63 Pac. 844, states clearly the distinction which must be made in the record of different kinds of documents, according to the purpose which the record is intended to serve. For instance, there is a wide difference between the record of a mortgage and a marriage certificate. The mortgage record is intended to *give notice,* and serves no purpose unless it *actually gives such notice.* The record of an official bond, or of a marriage certificate, is to complete the act or to comply with a statutory requirement. The latter is the only purpose served by the record of a power of attorney. Surely a power of attorney need not be recorded to protect innocent parties by any form of notice. No, it must be recorded to comply with a statute intended to guard against frauds, precisely for the same reason as the official bond and the certificate of marriage are required to be recorded. This distinction is splendidly stated in *Cady vs. Purser,* from which we quote at pp. 845-6:

"For the purpose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder's office is sufficient; but when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect—as when his purpose is to give notice of his interest in real estate—Section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be "recorded as prescribed by law." By this requirement, in order that constructive notice of the contents shall be given to subsequent purchasers and mortgagees, the Legislature must have intended something in addition to depositing the instrument in the recorder's office for record, since that had already been provided for in Section 1170."

The distinction is well drawn in that decision. It points out specific statutory requirements for the record of a mortgage in California in order that same shall give the necessary constructive

notice. Even that might be unnecessary were it not for the specific statute in California. Without the specific statute, the rule would doubtless be the general rule stated in Cyc. Certainly, in Alaska, without a specific statute as to powers of attorney, the general rule stated in Cyc. must prevail, and more especially as to the statute relating specifically to conveyances (Sec. 522) provides that same "shall be considered as recorded at the time it was so received." Surely a greater requirement cannot be construed for an instrument not bearing notice to possible innocent parties or subsequent purchasers for value.

The case of *Watkins vs. Wilhoit,* 38 Pac. 53, fully recognizes this distinction. There the court held that an assignment for the benefit of creditors, which was not recorded or transcribed in the record books of deeds, but simply in "Book G, Miscellaneous," was valid as to creditors, although it might be questioned by a subsequent purchaser or mortgagee.

Lindley on Mines (3rd. Ed.), Sec. 390, states:

> "If the certificate is deposited with the recorder to be recorded, that is sufficient. His failure to record will not injure the locator."

Citing *Shepard vs. Murphy,* 26 Colo. 350, 58 Pac. 588, from the syllabus of which we quote:

> "Where the locator of a lode claim lodges his certificates with the proper officer for record within three months from discovery, and the officer notifies him that it will be recorded, he has done all that is required of him by Mills' Ann. St., Section 3150, requiring that he shall record his claim in the office of the county recorder by a location certificate within that time."

Shamel on Mining Law (p. 122) states:

> "If the locator makes his location properly, and files the notice with the proper officer, the negligence of such officer in making mistakes or in not recording it will not deprive the locator of his rights."

No doubt the record of the power of attorney, as required in Alaska by the Wickersham Act, is an "essential step in perfecting some right or completing some act," as stated in *Cady vs. Purser, supra,* but in such cases "the depositing of the instrument in the recorder's office is sufficient," as therein stated.

A holding adverse to our contention would invalidate dozens of locations made in the Shushana region, and doubtless elsewhere throughout Alaska, for it is well known that local recorders, especially

in mining districts in Alaska and elsewhere, and more especially during the rush following a new "strike," do not record documents with care. Details cannot be elaborately exacted. No good purpose would be served thereby. The plaintiff in error would have been in no different position had the power of attorney and location notice been recorded in *extenso*. In any event, he is not an innocent sufferer through any failure or neglect of the recorder, as the defendant and dozens of others of the first locators would have been had the court held with plaintiff's contention.

Such a ruling will surely result in manifold litigation, perhaps fifty new law suits in the Shushana region alone. The great wrong thereby wrought upon the first locators, innocent men acting in the utmost good faith, will be given due and thoughtful consideration by the court.

The defendant in error respectfully submits that the writ should be denied and the judgment affirmed.

Respectfully submitted,

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Attorney for Defendant in Error.

LYONS & ORTON,

Of Counsel.

APPENDIX A.

Decision of the court in re Likaits vs Johnson in the District Court at Cordova, Alaska, March 18, 1914.

The plaintiff in this action seeks the possession of a placer mining claim in what is known as the Shushanna mining region, Alaska. Plaintiff claims to be the owner of said mining claim and that on or about the 20th of August, 1913, the defendant unlawfully entered thereupon and ousted the plaintiff therefrom.

The intervenors, James, Nelson, Johnson and Wales, allege that on May 25th, 1913, they made two contiguous lode locations; that about August 20th, 1913, the plaintiff entered upon a portion of the ground covered by said lode locations and attempted to make the placer location alleged by plaintiff in his complaint.

The defendant Johnson by his answer claims that he is the owner of the placer claim known as No. 1 Above Discovery on Bonanza Creek, being the same ground covered by plaintiff's placer claim described in his complaint; that the defendant since prior to July 30th, 1913, was and ever since has been the owner and in possession thereof by right of discovery and location, and denies that plaintiff has any right in or to said placer mining claim.

The case is submitted upon an agreed Statement of Facts entered into in writing by the attorneys for the plaintiff, defendant and intervenors, from which it appears that the defendant Johnson outfitted or grubstaked William E. James at Dawson about September 1st, 1912, to go upon a prospecting trip near the headwaters of White River, in the Territory of Alaska, James taking with him a power of attorney executed by Johnson to James, dated June 7th, 1909, authorizing James to make placer mining locations in Alaska as attorney-in-fact for Johnson; that about Christmas 1912 James, together with Nelson and Wales, reached Beaver Creek, near the international boundary line between Alaska and the Yukon Territory and camped at a cabin owned by James about forty miles from the headwaters of the Shushanna. In March, 1913, Nelson and James made a prospecting trip to the Shushanna and returned

to the cabin at Beaver Creek, remaining there until the middle of April, when James, Nelson and Wales left for the Shushanna region, taking their outfit for the summer's prospecting. They left a considerable portion of their outfit at Beaver Creek. James also left said power of attorney at Beaver Creek with his other effects. At this time there was no United States commissioner or recorder in said White River district, but on May 7th, 1913, the judge of this court established the White River Recording Precinct and appointed one H. E. Morgan commissioner thereof. James, Nelson and Wales reached Shushanna late in April, and James made the first discovery of placer gold in said district on Bonanza Creek early in May. On July 8th, 1913, he located the placer ground in controversy, consisting of twenty acres on Bonanza Creek, a tributary of the Shushanna, designating it as placer claim No. 1 Above Discovery on Bonanza.

Prior to this, on May 25th, 1913, intervenors made valid discovery and location of two certain lode locations or claims designated as the Bonanza and Eldorado quartz mining claims, which extend almost at right angles across the lower or southerly 500 feet of placer claim No. 1 Above Discovery on Bonanza, claimed by defendant. It was then believed by the defendant Johnson and also by James and Nelson that the White River region of Alaska, including the so-called Shushanna diggings, was within the Forty Mile district, where the recording office is at Steele Creek, Alaska. The White River region had been included in the Forty-Mile recording district until the Fourth Judicial Division was created in 1909. The fact that it was thereby segregated from the Forty-Mile district had not become generally known to the prospectors in the White River region. The general custom was to send location notices and other instruments for record to the recorder at Steele Creek in the Forty-Mile district, where the same were recorded as late as the summer of 1913. This custom was known to James and his companions and also to the defendant Johnson, all of whom fully relied and acted upon the same.

On May 13th Nelson left for Dawson to confer with defendant Johnson and to arrange for an outfit for placer mining during the summer. En route he went through Canyon City, Y. T., where he learned that on the previous day said H. E. Morgan had departed for Dawson. Nelson continued his journey, overtook Morgan and traveled with him to Dawson. Said Morgan did not know of his appointment as commissioner of the new White River precinct until after his arrival at Dawson. Neither did Nelson know of it. Nelson met Johnson in Daw-

son, where Johnson provided an outfit for placer mining operations costing over $600. They were also then advised of the Act of Congress of August 1st, 1912, requiring that powers of attorney be recorded. Johnson then executed his power of attorney to James, dated May 28th, 1913, and forwarded same to Steele Creek, Alaska, in the Forty-Mile district of Alaska, being in the Fourth Judicial Division, where the same was recorded June 23rd, 1913. Nelson returned to the Shushanna, traveling with several others, and they arrived at the Shushanna diggings about June 26th, 1913. The said Morgan arrived in the Shushanna on or about July 20th, 1913, and established a recording office.

Upon the arrival of Nelson and party in the Shushanna about June 26th, 1913, with the information that Morgan would soon be there and a recording office established, James sent one Gates to his cabin on Beaver Creek to obtain the Johnson power of attorney that same might be promptly recorded upon the arrival of Morgan. Gates met with an accident which so detained him that he did not return to Shushanna until August 7th, 1913. On said date, to-wit: August 7th, 1913, James, as attorney-in-fact for Johnson, having performed all the acts required by law in the matter of discovery, notice, and marking the boundaries of said placer claim No. 1 Above Discovery on Bonanza, filed a notice of location thereof in due form with the said Morgan as United States commissioner and ex-officio recorder, and same was recorded at page 89 Volume 1 of the mining records of said White River Recording District, Alaska, and also on the same day, recorded said power of attorney from Johnson to James.

That plaintiff Likaits arrived in the Shushanna diggings early in August, went upon the ground in controversy included in the claim designated as No. 1 Above Discovery on Bonanza Creek, and made a discovery of mineral thereon on August 20, 1913. On the same day he posted a notice of location within a few feet of the notice posted by James for defendant Johnson. Defendant's location notice as well as plaintiff's were both posted upon the area in conflict with the Bonanza and Eldorado lode locations made by the intervenors.

Plaintiff on August 20th, 1913, staked and marked the boundaries of the placer ground claimed and described in his complaint and otherwise complied with the laws of the United States and of the territory of Alaska in force at that date. The defendant's notices of locations and the stakes and markings established for the defendant by James in May, 1913, as

well as the monuments of the lode locations, all remained on the ground and were seen by plaintiff. Plaintiff duly recorded his notice of location in the said White River precinct on September 19th, 1913.

It is agreed that judgment in this action for possession of the ground in controversy may include judgment for one dollar damages and costs of suit. The mineral character and value of the ground is admitted. It is also admitted that plaintiff, and said James as attorney-in-fact for defendant, each made a satisfactory discovery of placer gold on the dates of their respective admitted locations. It is admitted that both locations were properly staked upon the ground. It is admitted that all acts performed by the defendant and in his behalf were regular and sufficient to constitute a valid location of the ground had the power of attorney from said defendant to James been duly recorded in any recording office in the Third Judicial Division of Alaska prior to July 8th, 1913. It is admitted that the acts of plaintiff were sufficient to constitute a valid location if the ground was then open for prospecting and subject to location in the manner provided by law, and it is admitted that all subsequent acts by plaintiff or in his behalf were in due form.

Prior to August 1st, 1912, any citizen of the United States, or one who had declared his intention to become such, could locate lode or placer mining claims in Alaska without limit as to number. He could also locate the same as agent for another without having any power of attorney, although it had long been the custom of prospectors to procure such powers of attorney.

By the Act of Congress passed August 1st, 1912, it is provided:

> "That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer mining claims for any one principal or association during any calendar month, and no placer mining claim shall hereafter be located in Alaska except under the limitations of this act.

"That no person shall hereafter locate, cause or procure to be located for himself more than two placer mining claims in any calendar month: Provided, That one or both of such locations may be included in an association claim.

"That no placer mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

"That any placer mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made."

The plaintiff's contention in this case is that the location by the defendant Johnson of placer claim No. 1 Above Discovery on Bonanza Creek, made by James as attorney-in-fact on July 8th, 1913, is null and void for the reason that the power of attorney from Johnson to James was not recorded before July 8th, 1913.

The determination of this question involves the consideration and construction of said Act of August 1st, 1912.

The purpose and intent of this act was unquestionably to correct the abuse, which had become so prevalent throughout Alaska, of staking and locating placer claims without number by those who preferred to use the hatchet and pencil rather than the pick and shovel. From the earliest days of the discovery of gold in California—the customs of miners which grew up out of necessity, and the subsequent federal legislation of 1866 and 1872, since construed and settled as they have been by federal and state courts, have fairly answered the needs of the prospectors and miners in the mineral public land states. In Alaska, however, the extremely liberal policy of the government has been grossly abused by the speculative so-called prospector, who by staking large areas of ground has sought to exact tribute from the more willing and industrious workers who happened to be late in point of time. The act above referred to is intended to correct this evil and should be given every effect to obtain that desirable end. No similar legislation by Congress was ever before enacted. The language of this act is so clear and plain that no dispute seems likely to arise thereunder, except this very important question—Must a power of attorney be recorded before the time the first step is taken in the location of a placer claim by the attorney-in-fact?

Prior to this Act of August 1st, 1912, three acts were necessary to constitute a valid location of a placer mining claim: first, discovery; second, marking of the boundaries of the claim upon the ground, and third, recording of the location certificate. It has been held by the Supreme Court of the United States and many times by the Alaska courts, and may be regarded as the settled law, that it is immaterial in what order these acts are performed, provided they are all performed before the accruing of any intervening or adverse rights.

In the case of Creede & C. C. M. & M. Co. vs. Uinta T. M. & T. Co., 196 U. S. Supreme Court Reports, 336, Mr. Justice Brewer (citing Brewster vs. Shoemaker, 28 Colo. 176, and other authorities), says on page 348:

> "The order of time in which these several acts are performed is not of the essence of the requirement, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only, all the necessary acts are done before intervening rights of third parties accrue. All these others steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate or file a new one."

And that has been the general doctrine. In 1 Lindley on Mines, 2nd Ed., Sec. 330, the author says:

> "The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights. The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator. But if the boundaries are marked before discovery, the location will date from the time discovery is made."

In Snyder on Mines, Sec. 354, it is said:

> "While the general rule is, as stated elsewhere in the foregoing sections, that a location must rest upon a valid discovery, yet a location otherwise good, with a discovery made after location and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery, and generally from

the first act towards claim and appropriation—this by relation."

In Morrison's Mining Rights, 11th Ed., p. 32:

> "If a location is made before discovery, but is followed by a discovery in the discovery shaft before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid."

This same question has been repeatedly decided by Alaska courts—See Heman vs. Griffith, 1 Alaska 264; Redden vs. Harlan, 2 Alaska 402, where the court says:

> "The marking of the boundaries may precede the discovery and recording or the recording may be first, and if all three are performed, though not within the time fixed by law or the rules and regulations, before other rights intervene or attach to the land, it is sufficient and the claim will be valid."

In addition to the said three essential acts necessary to make a valid mining location, there is now added, by this Act of August 1st, 1912, a fourth, to-wit: that a person locating a placer claim in Alaska as attorney for another shall be duly authorized thereto by a power of attorney in writing duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Counsel for plaintiff contend that this is not an act of location but is a qualification of the one making a location as attorney-in-fact for another and the power of attorney must be recorded before the first step is taken in attempting to make such location of a placer claim. In the same sense the recording of a certificate of location is not an act of location but an evidence only that a location has been made. The executing and recording of the power of attorney is an evidence only that the attorney-in-fact was duly authorized thereto, and **the act does not in express terms require that such power of attorney must be recorded before any initial step is taken** to make a location of a placer mining claim. In a broad sense every act and thing necessary to be done before the location is perfected may properly be termed one of the acts of location.

The legislature of Alaska seems to have recognized that said Act of August 1st, 1912, did not require a power of attorney to be so recorded, and by an act passed April 30, 1913, which became operative July 29th, 1913, provided:

> "That no person shall hereafter locate any mining claim in the Territory of Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, which shall be witnessed by two witnesses but need not be acknowledged, and recorded in the office of the recorder in whose precinct such location is made, previous to the date of the initiation of such location."

In the case of Sturtevant vs. Vogel, 167 Fed. 452, the Circuit Court of Appeals for the Ninth Circuit held that in Alaska a notice of location of a mining claim is not required to be recorded. The law merely permits the recording of such instrument, and the court says, citing the case of Ford vs. Campbell, 92 Pac. 206:

> "The intention that failure to comply with the statute should work a forfeiture of mining rights ought not to be imputed to the legislature except on the very clearest language, not susceptible to any other reasonable construction."

It is a sound principle of equity and good conscience that forfeitures are odious in the law, and the courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights. Butler vs. Good Enough Mng. Co., 1 Alaska 246; Debney vs. Iles, 3 Alaska 438.

James, the attorney-in-fact for defendant Johnson, using money and supplies of Johnson, had gone into a remote and inaccessible portion of the interior of Alaska, enduring the hardships of an Arctic winter, and the following spring or summer had through his enterprise and industry made a valuable discovery resulting in what later became known as the Shushanna strike. In the name of and for the benefit of the person whose financial support had enabled him to enter upon this arduous undertaking, he located placer claim No. 1 Above Discovery on Bonanza Creek. He is provided at this time with a power of attorney duly executed and acknowledged by Johnson June 7, 1909.

Without commenting on the numerous details evidencing the good faith of James in attempting to comply with the law, it appears that he filed for record this power of attorney on the same day that he filed his notice of location, to-wit: on August 7th, 1913, with the United States Commissioner and ex-officio Recorder Morgan, who had only come into the said region and established an office about July 20th, 1913. It would have been impossible for him to have recorded said

power of attorney with said recorder before July 8th, the date when he initiated said location of Bonanza No. 1 Above Discovery, for the reason that no recording office then existed there. The nearest recording district in the Third Judicial Division was distant about 200 miles, to-wit: at Copper Center or Chitina, which said two recording precincts were over and beyond an impassable range of mountains, far to the south and west, with glaciers and swift and dangerous rivers intervening, and yet the plaintiff insists that the defendant should, prior to July 8th, 1913, have recorded this power of attorney in some recording district somewhere in the Third Judicial Division of Alaska, which extends from the international boundary line between Alaska and British Columbia to the Aleutian Islands, reaching past the 180 Meridian into the Eastern Hemisphere. Of what possible use to the plaintiff could such a literal compliance with what he claims to be the requirement of this act have been, that said power of attorney be recorded hundreds of miles away, far beyond the ken or knowledge of plaintiff? The plaintiff did not come into the Shushanna country until August. When he went upon the ground he saw the notice and stakes and markings of the defendant on the ground. Some two weeks before he attempted to make his location, the last act of location on the part of the defendant had been performed, to-wit: the recording of the notice of location and the recording of the power of attorney, and yet the plaintiff seeks to appropriate the fruits of the toil and enterprise of the defendant and deprive him of his just reward, because said power of attorney was not sooner recorded. It seems a most unconscionable thing to do and to award him this ground would be a travesty on justice, and should only be done in case the said Act of August 1st, 1912, is susceptible of no other reasonable construction than that the power of attorney therein provided for must be recorded, not in the recording precinct where the claim is situate, but anywhere within a judicial division extending over hundreds of miles, in most instances with no practicable means of communication between the fifteen or more recording precincts therein, before any step whatever is taken by the attorney-in-fact to initiate the location of a placer mining claim. It is well known that prospectors are migratory and easily stampeded, and a prospector might have a power of attorney duly recorded at Nushagak or Susitna and starting on a long trail to some new strike, consuming weeks of laborious and dangerous travel, and be qualified on reaching the new strike to locate a claim as attorney-in-fact, because he had his power of attorney recorded in a place utterly beyond the reach or knowledge of

one seeking to take his claim away from him. Here the power of attorney was recorded right where both plaintiff and James were, and where the mining claim was situate, and two weeks before the plaintiff made any attempt to locate the ground over defendant's location.

The primary purpose of this act was to limit not only the number of claims that could be located by an attorney-in-fact to two claims in each calendar month, but as well to limit the number of claims that any person could locate in his own name and right.

It would seem that a reasonable construction of this act would be to require that an agent or attorney be authorized by a power of attorney executed and acknowledged before the first step is taken in making a location, but it is not necessary to decide that question in this case, for concededly the power of attorney from Johnson to James was so executed and acknowledged in June, 1909.

But the act does not in express terms require that the power of attorney be recorded before the first step is taken in making the location, nor unless the same is so done the location shall be null and void, and as said in Sturtevant vs. Vogel, supra, "the intention that failure to comply with the statute should work a forfeiture of mining rights ought not to be imputed to the legislature except upon the very clearest language, not susceptible to any other reasonable construction."

In the leading case of Jupiter Mining Co. vs. Bodie Company, 11 Federal 666, 4 Morrison Mng. Rep. 428, the court says:

> "As a general principle of law, forfeitures are not favored. * * * The congressional law does not require a record, but prescribes what a record shall contain when it is required by the local rules.
>
> "If there were no local rules in Bodie mining district attaching the penalty of forfeiture to the failure to record in that district, and recording was not made by custom an act of location, then the fact that the Lucky Jack claim was not recorded in the records of Bodie mining district will not invalidate the location, as to any party having actual notice of that location, and in that case the jury are instructed that if the Lucky Jack location was regular in all other respects, and the laws requiring work were complied with, the fact that the claim was not recorded in the Bodie mining district did not invalidate the location, or make it lawful for plaintiff's grantors, if they

had actual notice of the previous location, to enter and locate the ground covered by the Lucky Jack location."

It is admitted that plaintiff had actual notice of the marking on the ground of said No. 1 Above Discovery on Bonanza, and that the location certificate and also the power of attorney were duly recorded in that particular precinct two weeks before plaintiff attempted to make his location, not as the courts have said "as a discoverer, but as an appropriator"—an appropriator of the fruit of other men's labor and toil.

In view of the principles and authorities above cited, I am of the opinion that a fair and reasonable construction of this act is that a forfeiture of a placer mining claim is not worked by the failure to record the power of attorney before the first step is taken in making the location of such claim, and especially is this true in a case where the attorney has been duly authorized thereto by a power of attorney executed and acknowledged before such initial step is taken.

I again repeat that the evident purpose and intent of this act was to limit the number of claims that might be located, and not to provide for a forfeiture for failure to record the notice of location. I do not believe it to be the intent of the act to work a forfeiture for failure to record the power of attorney, where it is recorded prior to the attaching of the rights of others.

On account of the views herein expressed, as to the construction and effect to be given to said Act of August 1st, 1912, it will not be necessary to inquire what was the legal effect, if any, of the recording on June 23rd, 1913, in the Forty-Mile precinct in the Fourth Judicial Division of Alaska of the power of attorney by Johnson to James dated May 28th, 1913.

Ignorance of the law is no excuse, but this recording at Forty-Mile, together with the other facts set out in the agreed statement, under the peculiar conditions existing in the remote and inaccessible interior regions of Alaska, all point to the good faith of defendant and his honest effort to comply with the law.

As to the rights of the intervenors in the two lode locations claimed by them, there seems to be no question but what, upon the agreed statement of facts, they were the prior locators of, made valid lode locations of the same, and are entitled to the 500 feet of the lower or southerly end of said Bonanza No. 1 Above placer claim.

I am compelled therefore to hold that plaintiff take nothing by this action and his complaint be dismissed; that the intervenors are entitled to the possession of the said two lode claims designated as the Bonanza and Eldorado quartz mining claims, including the lower or southerly 500 feet of the said placer claim No. 1 Above Discovery on Bonanza Creek; that the defendant is entitled to the remainder of said placer claim.

Findings and decree may be entered accordingly.

FRED M. BROWN, Judge.

Dated at Cordova, Alaska, March 18, 1914.

APPENDIX B.

Decision of Judge Brown in re Sutherland vs Purdy in the District Court at Cordova, Alaska, April 2, 1914, overruling plaintiff's objections to testimony as to the power of attorney from defendant to G. L. Gates.

Section 129b, Compiled Laws of Alaska, enacted August 1st, 1912, provides:

> "That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made."

I had occasion to construe this section in the recent case of Lakaits vs. Johnson (decided March 18, 1914), and there held that the act of recording the power of attorney was one of the acts of location, and that it is immaterial in what order the several acts of location are performed, provided they are performed before the rights of another intervene.

In this case, defendant Purdy claims to have given his power of attorney in writing, duly acknowledged, to one Gates on May 31st, 1913. Gates claims that he made a location on a placer claim for Purdy, under said power of attorney, on July 6th, 1913, and that he made discovery, marked the boundaries of the claim, and on July 27th, 1913, filed his location certificate with the recorder at Shushanna (or White River precinct), and on July 29th filed said power of attorney with said recorder. On the trial of this case, the witness Gates claims that he has lost said original power of attorney, and testifies that he has made diligent search therefor, giving details of where and when and how he made search and cannot find it.

Had the power of attorney been properly recorded by the recorder in said precinct, said record would have been offered and received as proof thereof. However, said recorder, having just assumed his office, and being unfamiliar with the duties thereof, and being in a remote and inaccessible region in the far interior of Alaska, evidently proceeded on the theory that

a mere abstract of the documents filed for record with him, was sufficient. Accordingly in this case he made the following entry in Book 1 of the Record at page 280:

"July 29, 1913.

Frank W. Purdy to G. L. Gates.

Sworn to before R. McDonald of Forty Mile.
Jas. McLeod.

May 31st, 1913.

Recorded at 55 m. past 6 a. m. July 31, 1913.
By request W. E. McKinney.

H. E. MORGAN, Rec'r.
H. H. Waller, Dep."

Defendant offers in evidence this record, together with the page immediately preceding and the page immediately following for the purpose of illustrating the method of said recorder in making said records or abstracts thereof, and also offers to prove, by the oral evidence of the witness Gates, the contents of said power of attorney claimed to have been lost. Defendant also claims to be able to prove the same facts by witness McKinney, who received the power of attorney from Gates and gave it to the recorder to be recorded.

Under the system in force in Alaska, whereby U. S. commissioners and ex-officio recorders receive fees only, in remote places it is exceedingly difficult to get competent and well qualified officers to fill such positions, where the fees may not afford even a living, and the methods of recording are often crude, as appears was the case here.

While there is a conflict in the authorities, there is abundant authority to support the proposition that when one has delivered an instrument for record to the proper officer, his duty ceases. See Shepard vs. Murphy, 58 Pac. 589, a Colorado case.

> "In the absence of any statute requiring it, a power of attorney need not be acknowledged or recorded, although as matter of proof of authority the power may be and usually is recorded with any recorded instrument which has been executed under it * * *. As the purpose of requiring acknowledgment and record is thereby to give notice to third persons, failure to record the power of attorney even when recording is required by law, will

not invalidate the agent's acts thereunder except as to creditors and subsequent purchasers without notice, unless the statute makes recording a prerequisite to authority to act, or provides that unrecorded instruments shall be absolutely void." 31 Cyc. 1231.

Counsel for plaintiff suggests that as plaintiff does not take the interest claimed by him by descent, he in law is a purchaser. But can it be said that he is a purchaser "without notice"?—Surely not, for the staking on the ground, the notice of defendant posted on the ground, every fact and circumstance in this case points conclusively to the fact that the plaintiff had actual notice that the ground he attempted to locate was already located and claimed by another, who signed the location as attorney-in-fact for his principal.

The purpose of this Act of August 1st, 1912, I am satisfied was primarily to limit the number of locations that could be made to two each calendar month. It was not intended in my opinion that the recording of the power of attorney was intended primarily to give notice to one seeking to make a location of unappropriated and unclaimed public mineral land.

That notice in most cases, and particularly in this case, was given to the subsequent locator, the plaintiff here, by the actual stakings or markings on the ground. The plaintiff testifies that he did not even look at the records, did not make any attempt to find if any location certificate or power of attorney had been filed or recorded by defendant, but that he did find the ground staked and defendant's location notice on the ground, but as plaintiff claims giving a misdescription of the claim. Had he have done so he would have found at least this abstract of the power of attorney which would have advised him that such an instrument had been filed by defendant.

Had the author of this Act of August 1st, 1912, intended that the recording of the power of attorney was for the sole or primary purpose of giving notice to a subsequent locator, he, Hon. James Wickersham, long one of the district judges in Alaska, and thoroughly familiar with the needs and peculiar conditions prevailing in this territory, would not have been satisfied with the provision that such power of attorney might be recorded anywhere in the judicial division wherein the location was made.

In this, the Third Judicial Division, such recording might literally have been done at a point over one thousand miles

distant from the place where a placer location could be made thereunder, and of what avail, as a matter of notice would such recording be?

I feel satisfied that the record made by the recorder, Morgan, of this power of attorney, defective though it be, ought to be admitted in evidence. That the defendant in good faith filed it for record and paid the recording fee, and had a right to rely upon the recorder performing his duty in recording it properly. To hold otherwise would be virtually to hold the location of defendant void, regardless of the fact that he may have made a valuable discovery, properly marked his boundaries on the ground, and otherwise complied with the law.

I am also satisfied that the defendant has met the requirements of the law in his showing of diligence in searching for the lost power of attorney, and should be permitted to give oral evidence of its contents. I am strengthened in this opinion by reason of the fact that the defendant made an application for a continuance in this case for the purpose of making further search for this lost document; and upon the court suggesting to counsel for plaintiff that terms might be imposed to indemnify plaintiff and his witnesses for loss of time and expense of delay if such continuance was granted, they did not meet such suggestion further than to set out in an affidavit that plaintiff would be damaged by such delay in more than three thousand dollars.

To reject the evidence thus offered by defendant would practically work a forfeiture of his mining claim, if it be sufficient in other respects, and so resting upon that highly useful and salutary principle that forfeitures are odious in the law, the courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights, I am compelled to overrule the objections to the introduction of the evidence so offered by defendant.

Filed April 2, 1914.